OAH Docket 68-0320-30040

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Grant Johnson,

Complainant,

vs.

Ron Erhardt and the Ron Erhardt Volunteer Committee,

Respondents.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

The above-entitled Campaign Complaint matter came on for an evidentiary hearing on October 30, 2012, before a panel of three Administrative Law Judges: Jeanne M. Cochran (Presiding Judge), James E. LaFave, and Miriam Rykken. The hearing was convened to consider a complaint filed with the Office of Administrative Hearings on October 4, 2012. The hearing record closed on October 31, 2012, with the uploading of the digital recording of the hearing.

Grant Johnson (Complainant) appeared on his own behalf without counsel.

Alan W. Weinblatt, Attorney at Law, Weinblatt & Gaylord, PLC, appeared on behalf of Ron Erhardt and the Ron Erhardt Volunteer Committee (Respondents).

STATEMENT OF THE ISSUE

Did the Respondents violate Minn. Stat. § 211B.03 by using the word "re-elect" on lawn signs promoting Mr. Erhardt's candidacy for the newly redrawn Minnesota House of Representatives District 49A seat when Mr. Erhardt is not the incumbent?

The panel concludes that the Complainant has not established by a preponderance of the evidence that Respondents used the word "re-elect" on lawn signs in violation of Minn. Stat. § 211B.03. The Complaint is therefore dismissed.

Based on the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. Respondent, Ron Erhardt, is a candidate for the newly redistricted Minnesota House of Representatives seat for District 49A.[1] Mr. Erhardt represented a majority of this district in the Minnesota House for nine terms as a Republican beginning in 1991. In 2008, he lost his bid for re-election to Keith Downey.

2. Respondent, Ron Erhardt Volunteer Committee, is the name of Mr. Erhardt's campaign committee. George Crolick and Ardis Wexler are the co-chairs of Mr. Erhardt's campaign committee.[2]

3. Mr. Erhardt's opponent in the November 6, 2012, general election is Republican endorsed candidate Bill Glahn.[3] Neither Mr. Erhardt nor Mr. Glahn are the incumbents in the election.

4. The Complainant, Grant Johnson, is a resident of Minnesota House District 49A and has worked over the years as a volunteer on behalf of campaigns for Republican candidates. Mr. Johnson has volunteered this year on behalf of Mr. Glahn's campaign for House District 49A.[4]

5. At the beginning of this campaign season, Mr. Erhardt had in his possession 317 campaign lawn signs from his prior re-election bids. The signs stated in part: "Re-elect Ron Erhardt." The signs came in two sizes and each sign has two sides. The smaller lawn sign is approximately 2' x 1.5.'[5] The larger lawn sign is approximately 2' x 4'.[6] Mr. Erhardt had 143 of the smaller signs and 174 of the larger signs.[7]

6. Mr. Erhardt and his committee members wanted to re-use the old lawn signs in this campaign but were concerned that the signs stated "Re-elect."[8] Mr. Erhardt contacted Michael Posnick, an attorney and volunteer with Mr. Erhardt's committee, and asked him whether he thought he could use the term "re-elect" on campaign material. After seeking advice from the Campaign Finance and Public Disclosure Board and the Office of Administrative Hearings, Mr. Posnick advised Mr. Erhardt not to use the word "re-elect" on his campaign material, including his lawn signs.[9]

7. Based on Mr. Posnick's advice, the Respondents decided to modify Mr. Erhardt's old campaign lawn signs by covering up the prefix "Re-" in the word "Re-elect" so that the signs stated only: "Elect Ron Erhardt Edina's Representative."[10]

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[1] Minnesota House District 49A includes most of the City of Edina in Hennepin County.
[2] Testimony of George Crolick and Ardis Wexler.
[3] Mr. Downey, the incumbent, is not seeking re-election to the Minnesota House of Representatives and is instead running for the Minnesota Senate District 49 seat.
[4] Testimony of Grant Johnson.
[5] Ex. B.
[6] Ex. C.
[7] Crolick Test.
[8] Testimony of Ron Erhardt; Exs. B and C.
[9] Testimony of Michael Posnick.
[10] Crolick Test.

8. Prior to Edina's annual 4th of July parade, members of Mr. Erhardt's committee covered up the prefix "Re-" on four or five of the larger signs so that they could use the signs in the parade. The committee members covered up the "Re-" by filling it in with indelible blue ink to match the blue background of the signs. After modifying a few signs in this fashion, the committee members decided that they would cover the prefix "Re-" on the remaining signs with blue duct tape.[11]

9. Sometime after Edina's July 4th parade, members of Mr. Erhardt's committee and other volunteers gathered in Mr. Erhardt's garage and spent hours methodically working through the stacks of old campaign signs. They affixed duct tape to the prefix "Re-" on one side of the sign, placed those signs in a pile, and then did the same to the other side of the sign. The committee members and volunteers also affixed a disclaimer to both sides of the signs. In the end, based on this process, each sign was handled by a volunteer four times to carry out the two modifications on each side of the signs. The intent of the Respondents was to cover the "Re-" on both sides of all of the signs. When the work was completed, Andre Novak, a volunteer with the Erhardt committee, fanned through the pile of signs to make sure that all of the signs had the "Re-" covered with duct tape.[12]

10. Mr. Erhardt did not modify any of his old campaign lawn signs himself. He did, however, post a number of the modified signs in the district when supporters requested signs be placed on their property.[13]

11. During the week of September 17, 2012, Mr. Johnson saw two of Mr. Erhardt's campaign lawn signs posted in Edina that did not have the prefix "Re-" in the word "Re-elect" covered on one side of the sign. These signs stated on one side: "Re-Elect Ron Erhardt." One of the signs was located at 4412 West 70th street and the other was located on Valley View Road near the Valley View Middle School and Creek View Lane. Both locations are on fairly busy thoroughfares in Edina.[14]

12. After waiting about 10 days to see if the signs would be corrected by the Erhardt campaign or homeowner, Mr. Johnson took pictures of the two lawn signs. Mr. Johnson attached copies of the photographs of the signs to the Campaign Complaint he filed against Respondents on October 4, 2012.

13. When the Respondents were made aware of the Complaint, they inspected the signs they had posted throughout the district to make sure they had all been properly modified. During this district-wide search, two more campaign signs were found without the "Re-" covered on one side of the sign.[15]

14. In total, of the 317 old campaign signs that the Respondents disseminated in support of Mr. Erhardt's 2012 campaign, four were found to not have the prefix "Re-"

[11] Testimony of Andre Novak.
[12] Testimony of Crolick and Novak; Exs. A-1, B and C.
[13] Testimony of Ron Erhardt and Ardis Wexler.
[14] Johnson Test.
[15] Testimony of Crolick and Erhardt.

covered on one side of the sign. The Respondents immediately covered the "Re-"on the signs when they were discovered. [16]

Based upon the foregoing Findings of Fact, the undersigned Panel of Administrative Law Judges makes the following:

CONCLUSIONS

1. The Administrative Law Judge Panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. Minn. Stat. § 211B.03 provides:

> **211B.03 Use of The Term Reelect**.
>
> A person or candidate may not, in the event of redistricting, use the term "reelect" in a campaign for elective office unless the candidate is the incumbent of that office and the office represents any part of the new district.

3. Because Mr. Erhardt is not the incumbent of the newly redrawn Minnesota House of Representatives District 49A, he and his committee are prohibited from using the term "re-elect" in his campaign.

4. The burden of proving the allegation in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.03 is a preponderance of the evidence.[17]

5. The Complainant has failed to establish by a preponderance of the evidence that Respondents violated Minn. Stat. § 211B.03 by using the term "re-elect" on campaign material when Mr. Erhardt is not the incumbent.

6. The attached Memorandum explains the reasons for these Conclusions and is incorporated by reference.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

[16] Crolick Test.
[17] Minn. Stat. § 211B.32, subd. 4.

ORDER

IT IS ORDERED:

That the Complaint filed by Grant Johnson against Ron Erhardt and the Ron Erhardt Volunteer Committee is DISMISSED.

Dated: November 5, 2012

s/Jeanne M. Cochran
JEANNE M. COCHRAN
Presiding Administrative Law Judge

s/James E. LaFave
JAMES E. LAFAVE
Administrative Law Judge

s/Miriam Rykken
MIRIAM RYKKEN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Where new districts have been created as a result of redistricting, Minnesota Statutes § 211B.03 prohibits a candidate from using the term “re-elect” unless the candidate is the incumbent for at least a portion of the newly drawn district. While Mr. Erhardt represented a majority of the district for nine terms beginning in 1991, he is not the incumbent in the November 2012 election for the newly created Minnesota House District 49A and therefore is prohibited from using the term “re-elect” in his campaign.

The Respondents do not dispute that, of the 317 old campaign signs that they disseminated in support of Mr. Erhardt's 2012 campaign, the prefix "Re-" in the word "Re-elect" was showing on one side of four signs.[18] The Respondents argue, however, that the Complaint should be dismissed for a variety of reasons.

First, the Respondents argued at the evidentiary hearing that the Complaint should be dismissed because the Complainant did not provide copies of his exhibit list and witness list prior to the hearings as directed in the Order for Evidentiary Hearing issued by Chief Administrative Law Judge Ray Krause on October 25, 2012. The Respondents' motion to dismiss the Complaint on this ground was denied at the hearing. The Complainant, Mr. Johnson, did not submit witness or exhibit lists because he did not intend to call any witnesses other than himself or submit any additional exhibits beyond what he had provided with the Complaint. As stated in the Order or Evidentiary Hearing and explained by the Panel, the Panel may consider any evidence and argument submitted until the hearing record closes, including what has already been submitted with the Complaint and at the Probable Cause Hearing. The Respondents were not prejudiced in any way by Mr. Johnson's failure to identify himself as a witness or by his decision not to list as exhibits the copies of the photographs of the campaign signs that he had already submitted with the Complaint. For these reasons, the Respondents' motion to dismiss on the ground that Mr. Johnson violated the Order for Evidentiary Hearing was denied.

At the close of the hearing, the Respondents argued that the Complaint should be dismissed because the Respondents lacked intent to violate the statute. This argument was raised by the Respondents at the Probable Cause hearing and rejected by Presiding Administrative Law Judge Cochran in her Probable Cause Order. The Respondents requested that the Panel reconsider that decision. The Respondents contend that, while the statute does not by its terms require a "knowing" violation, the Panel should nonetheless read the statute as implying that a violation cannot be found unless an intent to violate the statute is shown. The Respondents assert that Minn. Stat. § 211B.03 is a criminal statute and note that courts look with disfavor on criminal offenses that do not require intent or *mens rea*.

The Panel will not read an intent requirement into Minn. Stat. § 211B.03. Unlike other provisions of Chapter 211B, such as § 211B.02 (false claim of endorsement), § 211B.06 (false campaign material) and § 211B.13, subd. 2 (bribery), the prohibition against using the term "re-elect" at § 211B.03 does not require that the violation be committed knowingly or intentionaly. In addition, while the provisions of chapter 211B provide for criminal penalties, the proceedings before the OAH are administrative. Should the Panel find a violation of Chapter 211B has occurred, it may refer a matter to the appropriate county attorney for possible criminal charges. The Panel itself, however, lacks the jurisdiction to find a party "guilty" of a criminal offense and a showing of criminal intent in the administrative process is not required. The Respondents' motion to dismiss on the grounds that the Complainant did not show the Respondents knew or intended that their acts would violate the statute is denied.

[18] Complaint Ex. 1-G and 1-H.

The Respondents also argue that the Complaint should be dismissed because any use of the word "re-elect" by Mr. Erhardt and/or his committee is not false since Mr. Erhardt once held the office of state representative. The Respondents point out that former Administrative Law Judge Kathleen Sheehy dismissed a prior similar complaint in *Maloney v. Anderson*,[19] on the grounds that use of the term was not false under § 211B.06 and did not violate the prohibition found at § 211B.03.

First, the Panel notes that the Complaint in this matter did allege a violation of Minn. Stat. § 211B.06 and that that claim was dismissed at the *prima facie* stage. In addition, there have been at least three decisions by the OAH that have rejected similar claims that use of the term re-elect by persons who once held the office they were currently seeking violated Minn. Stat. § 211B.06.[20] With respect to the *Maloney* decision, the claim that use of the term re-elect by a prior office-holder violated § 211B.03 was rejected because the statute only prohibits using the term in a year when districts have been re-drawn as a result of redistricting. That was not the case in *Maloney*, but is the case here. The district that Mr. Erhardt seeks to represent was re-drawn due to redistricting in 2012. Therefore, the Respondents' argument that the Complaint should be dismissed because use of the term "re-elect" is not false and/or based on the decision in *Maloney* is denied.

Finally, the Respondents argue that the Complaint should be dismissed because they did not "use" the term "re-elect" on the lawn signs. The Respondents contend that they made great efforts to modify all of the old lawn signs by covering the prefix "Re-" so that the signs did not state "Re-elect." The Respondents note that the record does not establish whether the Respondents missed four signs despite their best efforts, or whether someone vandalized the signs by removing the duct tape on one side, or whether the tape somehow fell off due to weather-related elements. In any event, the Respondents insist they did not "use" the term re-elect as contemplated by the statute. Alternatively, the Respondents argue that if the Panel does find the Respondents in fact "used" the term re-elect, the violation should be found to be de minimis.

The record established that the Respondents and other supporters of Mr. Erhardt went to great lengths to modify all of Mr. Erhardt's old campaign lawn signs so that they did not use the term "Re-elect." The Respondents were aware of the prohibition set forth in § 211B.03 and the evidence demonstrated that they made every effort not to disseminate a sign that stated "re-elect." The fact that, out of the 317 old signs, four signs somehow slipped through the process or were vandalized, is insufficient to support finding a violation of § 211B.03.

Having considered all of the evidence and argument, the Panel is persuaded that the Respondents did not "use" the term "Re-elect" within the meaning of the statute. Even if it could be found that they used the term, the Panel concludes that the violation is so de minimis as to not warrant a penalty. Therefore, the Complaint filed by Mr.

[19] *Maloney v. Anderson*, Dismissal Order, OAH Docket 3-0320-17444-CV (Aug. 11, 2006);
[20] *See Maloney v. Anderson*, Dismissal Order, OAH Docket 3-0320-17444-CV (Aug. 11, 2006); *Maloney v. Oman*, Dismissal Order, OAH Docket 4-6349-17443-CV (Aud. 11, 2006); *Macklin v. Nienow*, Dismissal Order, OAH Docket 4-0320-21311-CV (May 12, 2010).

Grant Johnson against Ron Erhardt and the Ron Erhardt Volunteer Committee is dismissed.

The Respondents argued at the close of the hearing that that the Complaint in this matter was frivolous and that Respondents should be awarded their attorney's fees. Pursuant to Minn. Stat. § 211B.36, subd. 3, the Panel may order a complainant to pay the respondent's reasonable attorney's fees and costs of the Office of Administrative Hearings if the Panel determines the complaint is frivolous. A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law.[21]

Respondents' request that the Complaint in this matter be found to be frivolous is denied as the Complaint was supported by good faith argument and had a sufficient basis in law to survive both the initial *prima facie* and probable cause review.

J.M.C., J.E.L. M.R.

[21] *Maddox v. Department of Human Services*, 400 N.W.2d 136, 139 (Minn. App. 1987).